

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: FLINT WATER CASES Case No. 16-10444

EMERGENCY MOTION
BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE
GENESEE COUNTY CIRCUIT COURT JUDGE
Virtual Hearing Via Zoom - Friday, October 2, 2020

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2 4:47 p.m.

3 -- --- --

4 THE CLERK OF THE COURT: Please rise. The United
5 States District Court for the Eastern District of Michigan is
6 now in session. The Honorable Judith E. Levy presiding.
7 Calling the Flint Water cases.

8 THE COURT: Thank you. And let me just go to the
9 docket where I have this brief.

10 Okay. Well, I received a motion, I don't know, an
11 hour, an hour and half or hour ago or something, that is
12 entitled -- it's the co-liaison counsel's motion for a
13 protective order and it is related to five expert depositions.
14 The first of which is Monday at 9:00 a.m. And so I decided
15 that the best approach that I could think of, because I didn't
16 want to just issue a decision one way or another without
17 hearing from the co-lead class counsel who, apparently, wish to
18 take these depositions or participate in them or have clients
19 participating or something like that, I thought the best thing
20 was to get us all together as quickly as possible before people
21 disburse for the weekend to another room in their house and see
22 if we could get this resolved, at least with respect to the
23 Monday deposition. But I think this is the same issue that was
24 on the Tuesday agenda.

25 I have some scheduling issues going on next week, so

1 if we can address this, the Tuesday issue today, which is
2 Dr. Specht, S-p-e-c-h-t, that would make me very happy. So
3 with all of those factors, I thought it would be best to
4 schedule something right away.

5 So, Mr. Walker, will you be speaking for co-liaison?

6 MR. STERN: I will, Your Honor. This is Corey Stern.

7 THE COURT: All right. Go ahead. Then here's the
8 question: You've already given me your motion, but what I
9 don't know about in the motion is what these individuals are
10 testifying to. I know Dr. Krishnan is the neuropsychologist
11 that we've -- or psychiatrist, I'm not sure which, that we've
12 been talking about her evaluation and her data. And I know
13 Dr. Specht is somebody who was going to be discussed on
14 Tuesday. But can you tell me what the areas of expertise are
15 for these and if they are related to the two -- I guess it's
16 two of the four bellwether plaintiffs they're going to testify
17 about. So I just want to know, generally, who they are and
18 what their testimony will relate to.

19 MR. STERN: Okay. No problem, Your Honor.

20 Dr. Krishnan is a neuropsychologist who evaluated each
21 of the four bellwether trial plaintiffs for cognitive deficits
22 and will be testifying about her perceptions, her conclusions,
23 her testing and the cognitive deficits that she may have found
24 through her testing and evaluations.

25 Dr. Specht is a Ph.D. and he deals with lead in bones

1 and he evaluated each of the four bellwether plaintiffs related
2 to the physical concentration of lead in their bones.

3 THE COURT: Okay.

4 MR. STERN: Dr. --

5 THE COURT: Now, is his testimony -- it sounds like
6 Dr. Krishnan's testimony goes to damages. Does it also go to
7 causation in general?

8 MR. STERN: Neither of them go to causation.

9 THE COURT: Okay.

10 MR. STERN: Dr. Krishnan will testify: "I did testing
11 and these were the results."

12 THE COURT: Okay.

13 MR. STERN: "I can't tell you why. That's not my
14 expertise. I could just tell you what I found."

15 Dr. Specht is not going to speak about causation.
16 Dr. Specht is going to speak about the physical attributes from
17 each of the children, four specific children. Neither of them
18 is being called to testify globally about the population
19 incident.

20 THE COURT: Okay.

21 MR. STERN: It's just about these four children.

22 Dr. William Bithony is a pediatrician who specializes
23 in lead. He used to run the Harvard lead clinic. He has
24 evaluated each of the four children and will opine about
25 causation in conjunction with the reports from Dr. Specht and

1 Dr. Krishnan and he is not talking about causation, generally.
2 He's talking about causation for each of these four specific
3 children based on his experience and expertise in this area,
4 the research that he's done with regard to the water, the
5 interviews he's done with the parents and the families of these
6 individuals, his review of the reports from Dr. Krishnan and
7 Dr. Specht and he's the causation expert.

8 THE COURT: Okay.

9 MR. STERN: Dr. Crakes is an economist who will
10 testify about -- you know, he's not someone who physically
11 evaluates the children, but he takes the reports for each child
12 from Dr. Krishnan, Dr. Bithony and Dr. Specht and then uses an
13 economic analysis to determine potential lost earnings over the
14 course of their life. So he'll be talking about their lost
15 earnings in conjunction with the medical findings of the other
16 three individuals. And then Dr. Michaels is a toxicologist who
17 will testify specifically about the toxicology of lead in the
18 four individual bellwether trial plaintiffs

19 THE COURT: Okay. Thank you. And then is it
20 Mr. Leopold or Mr. Pitt or somebody else who wants ...

21 MR. LEOPOLD: Mike, do you want me to handle it or
22 will you handle it?

23 MR. PITT: I can handle it, Your Honor.

24 THE COURT: Yeah. Let me start by asking you a
25 question.

1 MR. PITT: Sure.

2 THE COURT: Do you want to participate in all five of
3 the depositions or just some of them? And by participate I
4 mean ask questions.

5 MR. PITT: Well, just one, Your Honor.

6 THE COURT: Which one?

7 MR. PITT: Dr. Specht.

8 THE COURT: Okay.

9 MR. PITT: And the attorney --

10 THE COURT: We'll get to Specht in a minute. But,
11 Mr. Pitt, can we then -- I am sensitive to the fact that these
12 are four children and it's medical information about the four
13 children. Do you have any objection to the relief that
14 Mr. Stern was seeking that clients and other members of the
15 public not attend these depositions?

16 I'm aware that sooner or later Mr. Stern will decide
17 who he's going to present as a witness at trial and some of
18 this testimony may come out at trial, but some may not. He may
19 decide I'm not going to use this witness. I will use this
20 witness. So at this point if there's something I can do to
21 protect these children's health care records, I'm happy to do
22 that.

23 Ultimately, at trial we're not going to clear the
24 courtroom. It will be a public trial and so on. But do you
25 have any objection to either not attending the other four or

1 attending as an observer but not getting copies of the medical
2 records and not having your clients present?

3 MR. PITT: Nope. No problem at all, Judge.

4 THE COURT: Okay.

5 MR. LEOPOLD: Your Honor, this is Mr. Leopold. I'm
6 sure the Court can appreciate, since we only had just a few
7 minutes.

8 THE COURT: Right.

9 MR. LEOPOLD: Mr. Pitt and myself have not had a
10 chance to even discuss any of these issues, other than globally
11 before -- not since the protective order came in.

12 I would think that in addition to Dr. Specht there may
13 be a few of these other experts that deal with the issue of
14 causation that we would also want to potentially ask questions
15 to based upon questioning from the defense of these experts.

16 THE COURT: Okay. And that is going to be
17 Mr. Bithony.

18 MR. LEOPOLD: I believe I heard Mr. Stern say one
19 causation expert. The last expert Mr. Stern talked about,
20 which was a toxicologist, I wasn't clear if that was myopically
21 focused on something related to the individual minors or some
22 aspect globally related to toxicological issues of lead in
23 minors. I'm just not sure.

24 And without knowing how the defense, based upon their
25 notices, are going to address these issues, as I think Mr. Pitt

1 is going to talk about, they are pretty broad notices that they
2 intend to go into a lot of different issues.

3 THE COURT: Okay. So Mr. Stern said it was a
4 toxicologist related to lead in the four named plaintiffs.

5 MR. STERN: All of the deponents, irrespective of what
6 VNA noticed in their deposition, are serving as experts for
7 these four individual plaintiffs.

8 THE COURT: Right. Here's what I'm sensitive to:
9 Back in July we had this discussion going in the other
10 direction where I think Mr. Shkolnik wished to take some -- ask
11 questions of class plaintiffs' experts and I think back at that
12 point -- and I may be misremembering -- I had said, you know,
13 he could have some limited slice because those experts are
14 testifying globally about causation or what liability -- or
15 whatever they're talking about.

16 But it could potentially effect individual's decisions
17 to either opt in or opt out -- or to opt out of a potential
18 class should there be one. So it made sense to me that some
19 questions get to be asked because those experts are talking on
20 behalf of all of the people in Flint, all of the property in
21 Flint, all of the commercial entities in Flint. And so I'm
22 trying to understand if this is different and it occurs to me
23 that it is. And that these are directed towards four children
24 only and not towards the big picture.

25 But tell me about Dr. Specht, Mr. Pitt.

1 MR. PITT: Yeah, sure. So Dr. Specht is an expert in
2 X-ray fluorescence. X-ray fluorescence, or called XRF, is a
3 technology where they use a very modest amount of X-ray
4 projected on to a child's bone and from that technology they
5 get a reading of lead within the bone structure.

6 THE COURT: Okay.

7 MR. PITT: He's a recognized expert in that
8 technology. And the class counsel has two ...

9 First, I mean, the Court should know that we represent
10 hundreds of children.

11 THE COURT: Right.

12 MR. PITT: And so the technology that Dr. Specht is an
13 expert in --

14 THE COURT: Well, when you say you represent hundreds
15 of children, we don't know what -- I'm deeply concerned. I've
16 been very clear about this, about whether there can be a class
17 of minors and I'm trying to turn my attention to that to sort
18 out getting some briefing just on that issue, but I'm not quite
19 there yet.

20 But I don't care about that. I mean --

21 MR. PITT: I mean, for purposes of the settlement --
22 proposed settlement that the state --

23 THE COURT: Oh, I see. Okay.

24 MR. PITT: -- negotiated we are representing hundreds
25 of children.

1 THE COURT: Okay. I got it. Got it.

2 MR. PITT: And so our interest is twofold with respect
3 to our clients, our children. First in the settlement
4 documents there is a grid --

5 MR. STERN: Michael, I would stop.

6 MR. SHKOLNIK: Your Honor, I would object to this.

7 THE COURT: Yes. We're on the record. There are no
8 attendees. So everybody here is on the record. But this
9 record -- this transcript can be purchased.

10 So what you're telling -- but you're telling me
11 that you represent many children and you want a chance to ask
12 Dr. Specht what?

13 MR. PITT: What has developed, Your Honor, is that
14 when VNA put out the deposition notice, they asked Dr. Specht
15 to produce a comprehensive set of documents that relate to this
16 technology. Not only the technology, but how he has developed
17 the protocols, the standard operating procedures, the test
18 results, global test results for Flint children, global test
19 results in general, how he calibrates his equipment, how he has
20 established various cutoff scores to determine if there's
21 actual lead in the phone, things of that nature.

22 THE COURT: So you're telling me that Dr. Specht has
23 actually conducted his XRF on hundreds, if not thousands, of
24 Flint children?

25 MR. PITT: I can't say that. I don't know. I don't

1 know the number. I know there's multiple number of children.
2 There is some indication that he has been active in the
3 community performing tests. And VNA is, of course, interested
4 in knowing what the results are and also the manner in which
5 Dr. Specht has been conducting the XRF tests. So, you know,
6 there is that concern.

7 But there's also the concern that class counsel have
8 is that the claim against VNA for damages is still going to
9 be resolved through the adversarial process, be it eventually
10 at trial. And what VNA can develop in the record in terms of
11 the XRF technology, whether or not it's a valid technology,
12 whether or not it's being used appropriately, what the results
13 have been, could have a tremendous impact on the outcome of the
14 trial that the plaintiffs will pursue against VNA. So as long
15 as there is active litigation against VNA, we should be able to
16 help shape the testimony that's going to be used, that may
17 impact our clients.

18 THE COURT: And are you calling Dr. Specht in your
19 case?

20 MR. PITT: You know, we have not made that
21 determination.

22 THE COURT: Because here's what I'm thinking: Based
23 on what you're saying to me, what Mr. Stern has told me is he
24 has done some testing. He's going to give the results on these
25 children. He's not going to be going into causation and all

1 this. He's going to be talking about what were the results.

2 And it sounds like, perhaps, VNA is going to attack
3 the test itself or something. But from what you're saying,
4 you've got a tremendous volume of information you want to learn
5 from this man. I think you need to set up a depo -- a notice
6 or ...

7 Well, he was on your side from what you're saying.

8 MR. PITT: Well, I mean, so --

9 MR. SHKOLNIK: Your Honor, can I say something here,
10 please?

11 THE COURT: Sure.

12 MR. SHKOLNIK: For the record, Hunter Shkolnik.

13 Dr. Specht is a retained expert in individual cases
14 hired by my law firm, first, as well as Corey's law firm.

15 THE COURT: Okay.

16 MR. SHKOLNIK: He's a private-hired expert. Contrary
17 to what Mr. Pitt has said, he has not provided global opinions.
18 He is not testifying about, quote, the community. He is only
19 testifying with respect to whatever clients he has examined for
20 me and now Corey's firm. And is not a class expert, is not for
21 the community, is not -- that's just not accurate.

22 And we have a bellwether case with four individual
23 people that are going to trial and once his testimony is put
24 forward, if it's put forward at trial, it will be public
25 record. If Mr. Pitt wishes to retain Dr. Specht, who is a

1 highly trained Harvard expert and -- and there's other ones.

2 They've written papers on this and they've contacted
3 these other experts. If they want to hire them, that's what
4 they get to do. They can do that. This is not the way to do
5 it.

6 I mean, whether or not VNA chooses to cross-examine
7 these experts, they're all big boys and girls. They can
8 cross-examine them and the experts are going to testify with
9 respect to the bellwether trials and the technology they
10 utilized. And all those transcripts will become public, if we
11 go to trial.

12 As to the class, there are different issues. The
13 issue is whether or not we are challenging a class in this case
14 and rather than ask to depose any of the experts they relied
15 upon secondarily -- because as challengers to a class, we would
16 probably have a right to do that. This is two different issues
17 here.

18 THE COURT: Yeah.

19 MR. SHKOLNIK: That was the point I was making back in
20 July.

21 MR. LEOPOLD: Your Honor, could I just briefly
22 respond? I appreciate Hunter's comments and I, in some
23 semblance, you know, agree on the latter half of what he said.
24 Whether they had standing to object to the class, et cetera, is
25 a different issue for a later day.

1 But can I just address the first part of what he said?

2 THE COURT: Sure.

3 MR. LEOPOLD: Thank you. The core issue is the issue
4 of methodology and the issue of *Daubert*-related issues.

5 THE COURT: But you don't need to worry about
6 Mr. Stern and Mr. Shkolnik's expert. That's going to be their
7 burden to bear.

8 MR. PITT: Yeah.

9 MR. LEOPOLD: But, Your Honor -- I'm sorry.

10 THE COURT: You're trying to pump up Mr. Specht or
11 Dr. Specht. They're going to have to do that. If you're
12 worried that he might not pass muster to provide all this
13 valuable information about lead in the community, I think you
14 should -- I don't think it's going to hurt. I think they are
15 qualified to defend their expert.

16 And, also, if a *Daubert* motion is filed challenging
17 Dr. Specht, I would -- and you want to weigh in as sort of a
18 amicus or something, saying this is very valuable or refutable
19 or whatever it is you're going to say, then that would be the
20 time to seek permission to file that in the individual case.
21 Because I don't think need to take their deposition --

22 MR. PITT: Your Honor, Michael Pitt again.

23 THE COURT: Yeah.

24 MR. PITT: I mean, what Dr. Specht is going to say in
25 the deposition may have a direct impact on the viability of our

1 clients' claims. So, I mean, as to who's retained the expert,
2 the fact he's going to express an opinion that may impact on
3 our clients' claims gives us standing to be at least present in
4 the deposition.

5 THE COURT: That's what I was going to say.

6 MR. PITT: And --

7 MR. STERN: I totally disagree.

8 THE COURT: Here's what I think we should do ...

9 And tell me, Mr. Stern, why I shouldn't do what
10 Mr. Pitt said. I think this is your retained expert on behalf
11 of four individual clients testifying to their level of lead in
12 the bone and the technique to determine it and whether it's a
13 valid technique.

14 So would -- because Mr. Pitt -- I mean, I don't know
15 why you would spend your time this way, but you can always
16 order the transcript. But I think that the data, the
17 information that relates to these minors should not be
18 distributed to everyone. So I'm granting your motion with
19 respect to all five that the private medical records of these
20 individuals will not be distributed at this point. If you
21 file -- you know, if you call these witnesses at trial, of
22 course, it will be public matter. If you respond to a motion
23 for summary judgment, it will be public then.

24 But, Mr. Stern, do you have any objection to Mr. Pitt
25 observing in real-time?

1 MR. STERN: I do. I have an objection. You know,
2 this is a little bit of why is the underlying data in what the
3 defendants are going to try and do to potentially *Daubert*
4 Dr. Specht different than what they're going to do to
5 Dr. Krishnan and her testing? Why is it different than what
6 they're going to do with Dr. Bithony and his evaluation?

7 THE COURT: Are you asking me?

8 MR. STERN: I'm asking a little bit rhetorically. The
9 reality is there's no difference between any of these experts.
10 They all have a bearing, potentially, under the argument that
11 Mr. Pitt just made as to whether their clients have viable
12 claims. It's not just a bone expert. It's the neuropsych and
13 the pediatrician and all of the experts we're using.

14 These doctors are going to be talking about children
15 who have not signed HIPPA releases for anybody but the
16 defendants to talk about or put into question their medical
17 records, to put into question the fact that maybe they've lost
18 IQ points. That an economist is going to talk about based on
19 his --

20 THE COURT: But he doesn't want all of them. He only
21 wants Dr. Specht.

22 MR. STERN: Dr. Specht is going to be talking about
23 private, protected health information. If Mr. Pitt wants it,
24 he can potentially order the deposition and then we have to
25 fight that. This is not intended -- these depositions are not

1 seminars for people to learn about things that they want to
2 educate themselves about.

3 THE COURT: Right.

4 MR. STERN: These are fact-finding depositions for the
5 defendants to determine whether their theories of their defense
6 are viable and how to attack the plaintiff's claims. And what
7 this sounds like to me is that the class lawyers would like the
8 opportunity to attend a seminar to learn about a bone program
9 that they could find out with less intensive means by
10 contacting either this expert or other experts and determine
11 what a program would look like and what's the viability of that
12 program.

13 I just -- I don't -- I don't know how to explain when
14 I'm prepping a mom for her --

15 THE COURT: But, Mr. Stern, he's not -- I'm not
16 considering giving Mr. Pitt an opportunity to ask questions. I
17 don't see what the harm -- I don't ...

18 And, Mr. Pitt, what I don't want is for their medical
19 records to be turned over because you're present. And because
20 I'm not at these depositions, are the documents sort of on the
21 screen the whole time or what?

22 MR. STERN: They're exhibits.

23 MR. PITT: Your Honor, I have no interest in these
24 medical records whatsoever. I am concerned about the
25 technology and what VNA is going to say about the technology

1 and these --

2 THE COURT: Then order the transcript. That's how
3 you'll find out.

4 MR. PITT: Well, Your Honor, I think we have a
5 right --

6 THE COURT: This is Mr. Stern and Mr. Shkolnik's case.
7 It's not your case.

8 MR. PITT: Except. Except ...

9 THE COURT: If you want to use Dr. Specht, then call
10 Dr. Specht.

11 MR. PITT: This technology is imbedded in this case.
12 Like it or not, it is imbedded in this case.

13 THE COURT: But then you're going to need somebody in
14 your case in chief to support it. I don't know if he's the
15 only one that is out there doing it. I doubt it, but I -- I
16 don't know anything about.

17 So here's what we'll do, because it sounds like it's
18 going to be very difficult not to participate, if that's what
19 you're there for is to ensure that this expert can survive a
20 *Daubert* challenge and VNA doesn't ask questions that somehow
21 upset the -- I don't really know.

22 So I think you just have to get your own expert on
23 this technology and work with them, learn the technology, sort
24 out the best way to defend it or whatever you want to do.

25 MR. PITT: Your Honor. Your Honor, the State of

1 Michigan has adopted this expert as part of the package that
2 we're --

3 MR. STERN: I'm ...

4 THE COURT: That's not --

5 MR. PITT: -- dealing with.

6 THE COURT: We're all talking at one time and Darlene
7 is only going to take me down when we're all talking at the
8 same time.

9 MR. LEOPOLD: Your Honor, one of the things that we've
10 attempted to do, we've asked -- actually, it was the
11 recommendation of the Special Master, which we all -- which
12 Mr. Pitt and myself thought was a good way to get around the
13 issue of concern by Mr. Stern is to, off the record -- I guess
14 Mr. Stern, certainly, can be on the call. And Hunter as well
15 would be fine.

16 Just to talk to the doctor because of his involvement
17 in other related issues. And we were told by the Special
18 Master that Mr. Stern did not agree with that.

19 MR. STERN: Your Honor ...

20 MR. LEOPOLD: I'm sorry?

21 We're trying -- this is not an issue of any
22 gamesmanship. It's just --

23 THE COURT: You can call him up today, can't you?

24 MR. LEOPOLD: No. They've refused to allow us to talk
25 to him off the record. That's what we've been wanting to do.

1 Per the Special Master, she suggested that as well. We've been
2 told by Debbie that Corey Stern refused to do that.

3 MR. STERN: Your Honor?

4 MR. SHKOLNIK: If I can just say something.

5 THE COURT: Time out. Just a minute. Mr. Stern
6 started talking first.

7 MR. SHKOLNIK: I'm sorry.

8 MR. STERN: Two things. One, I asked Special Master
9 Greenspan if she actually recommended that and she said no.
10 She told me straight up that was not a recommendation that she
11 made.

12 Number two, everyone needs to recognize that there is
13 still, what I would consider, the most voluminous motion for
14 class certification that I have ever experienced in my practice
15 that is pending that involves thousands of my clients, all of
16 which are minors, that I oppose. And while I would like to be
17 cordial and kind and respectful of the other plaintiffs' desire
18 to certify a class, I'm not going to facilitate anything that's
19 going to assist the certification of a class that I
20 fundamentally disagree with.

21 So if y'all want to call Dr. Specht and see if he'll
22 talk to you, I'm not his keeper. I can't tell you not to call
23 him, but I can explain to him how I feel about it and know for
24 certain that he's not the only expert that deals in this type
25 of work. And so if he was the only expert in the entire world

1 that dealt with this type of expertise, then I can understand
2 why it's so important for you to talk to him. But the reality
3 is there is others who do this. So call one of them.

4 MR. SHKOLNIK: If I can just ask one point? This is
5 Mr. Shkolnik.

6 THE COURT: Yes.

7 Thank you, Mr. Stern.

8 MR. SHKOLNIK: It's my understanding that one of the
9 authors of the research in this field is another doctor that
10 Mr. Pitt has reached out to or someone from the class group has
11 reached out to in this area.

12 So I know of just that one and there are major centers
13 in the country that do this that are available and there's a
14 lot of them willing to be hired as experts and charge
15 substantial sums to be experts in this litigation.

16 MR. LEOPOLD: With all due respect, it's not an issue
17 of about hiring experts or paying experts. I think everybody,
18 respectfully, understands that. Those aren't the issues. And,
19 Your Honor, we'll follow whatever the Court wants to do.

20 I think out of fairness what is being represented is
21 not the total picture, but we'll go with whatever the Court
22 wants to do.

23 THE COURT: Yeah. And the problem is the more I
24 listen, the more I really think that there would be nothing
25 productive by attending this deposition. Because this is a

1 deep issue, whatever it is, and I'm not really understanding
2 it. And part of the reason is that little tidbits about the
3 settlement have been provided, but I don't think I've got
4 anyone from the State even on here. And it's also not proper
5 to do that at this point. But I don't think any harm has been
6 committed or done.

7 But the fact is, it sounds like this is a very big
8 issue to the class. And so it just cannot be accomplished at
9 the deposition that is being taken in anticipation of the four
10 bellwether plaintiffs' trial.

11 So at this point -- it's a deep issue. It's something
12 between the State and the class or somebody's going to have to
13 work it out, how to defend this -- so it sounds like everybody
14 likes this technique except VNA or something like that.

15 MR. LEOPOLD: Your Honor, may I ask a question?

16 THE COURT: Sure.

17 MR. LEOPOLD: Of Your Honor. Because you referenced
18 it earlier and, of course, I certainly respect the Court's view
19 and understand the broader issues.

20 But just going back to what Your Honor ruled, I think
21 it was in July, where it was it wasn't Hunter, it was Corey
22 Stern who raised the issue about attending the depositions and
23 the Court gave an hour for him to depose all of the class
24 experts. And in your order -- I forgot the page, but I read it
25 earlier this morning, the transcript -- where you said that is

1 fine and then class counsel will have the same opportunity.

2 Which experts will we be able to do that if it's not
3 these?

4 THE COURT: Well, here's the situation to me: You're
5 not seeking to take these other four, but ...

6 MR. LEOPOLD: Well, there was one expert about
7 causation issues that dealt -- it sounds like would certainly
8 go with liability issues. Without bothering the Court --

9 THE COURT: The issue for me is the ones that I think
10 would be appropriate is if there are global liability experts.
11 If there are -- that will impact -- potentially impact more
12 than -- that are not testifying about someone's individual
13 medical condition. So what we'll do -- and plus, the issue was
14 not fully before me when I said that. And so it sounded like a
15 good thing to say at the time.

16 Because it didn't occur to me that -- I wasn't
17 thinking in the sense that there's going to be a neuropsych
18 testing of these four children and is it valid? You know, I
19 wasn't thinking about that.

20 MR. LEOPOLD: With all due respect ...

21 THE COURT: Tell me which one you want to take.

22 MR. LEOPOLD: Well, I was going to say two things.
23 With all due respect, we've had this motion for less than a
24 half hour.

25 THE COURT: I know.

1 MR. LEOPOLD: We haven't been able to brief it,
2 research it, none of those things. So ...

3 But, again, we'll respect the Court's ruling.

4 THE COURT: Yeah.

5 MR. LEOPOLD: So I'm not sure that's in terms of
6 fairness is fair. But that being said, Mr. Stern said the
7 issue of causation was what one of the experts was going to
8 testify. My understanding of what he said -- and I may be
9 mistaken -- was not the issue of causation. Yes, the child has
10 lead levels in his or her system, I understand that.

11 The issue is the expert was going to talk about, I
12 believe, in some semblance, of how did it get there? What was
13 the process? That is global for every child in this class or
14 the 5,000 or so that are signed up.

15 THE COURT: Do you have a causation expert on lead?

16 MR. LEOPOLD: Yes, we do.

17 THE COURT: Okay. So I don't know --

18 MR. LEOPOLD: So does Mr. Stern in his taking our
19 experts.

20 THE COURT: I know.

21 MR. LEOPOLD: What's the difference is what I'm trying
22 to understand.

23 THE COURT: Yeah. I hear you.

24 MR. STERN: If the --

25 THE COURT: Stop. Stop.

1 MR. LEOPOLD: Please. I would rather hear from the
2 Court. Not you, please.

3 THE COURT: Okay, people.

4 What is Dr. Bithony's -- well, doctor is a Ph.D.
5 Whoever it is.

6 MR. STERN: November -- the beginning of November.

7 THE COURT: Okay. Then I'll allow Mr. Leopold, I hear
8 what you're saying, it seems unfair in some ways that I
9 convened this within an hour or two of getting this motion. So
10 if you want to submit a one-page summary on Dr. Bithony, you
11 can both do that and we'll address it later in October. Not on
12 Tuesday. Because I don't have time.

13 MR. STERN: Just before anybody spends the time on it.
14 I just want to clarify what I said.

15 THE COURT: Okay.

16 MR. STERN: Dr. Bithony will be testifying for Child A
17 about the cause Child A's cognitive deficits. The cause of
18 Child B's cognitive deficits. The cause of Child C and the
19 cause of Child D. He's not talking about water systems or
20 about -- you know, he will say that, "I evaluated this child.
21 I met with the parents. I understand that this child drank the
22 water up until March 15th, 2015. I've looked at his medical
23 records. I've looked at his academic records and in light of
24 my experience and training, in light of the cognitive deficits
25 reported by Dr. Krishnan and in light of my own evaluation of

1 this child, I believe that the cause of those
2 neuropsychological deficits was exposure to water."

3 That is the essence of that testimony. That's not
4 global. That's not the same as a global expert who is talking
5 about water systems and hydraulics and ...

6 THE COURT: Well, I guess my issue is if this person
7 is going to do the seminar for the Court and the jury on all of
8 the ranges of what lead does to people, I could see
9 Mr. Leopold's point.

10 So is that what -- is Dr. Bithony going to tell us
11 this degree of lead causes this amount of cognitive --

12 MR. STERN: No.

13 THE COURT: Okay. All right.

14 MR. LEOPOLD: Is there an expert -- I'm assuming
15 whether it's a liability expert. I don't know. I'm assuming
16 they have some experts that will be dealing with those more
17 global issues.

18 MR. STERN: Yes.

19 MR. LEOPOLD: We have not been provided the experts'
20 reports because they have not allowed us to see them. I'm not
21 sure what the secret is.

22 MR. STERN: I'm not ...

23 MR. LEOPOLD: Could I please just finish, Corey?

24 We haven't been allowed to see them. We're all under
25 a protective order. I'm not sure what the big secret is if the

1 defendants have seen them. But if those liability expert
2 reports can be provided, we can provide a list to the Court and
3 then brief it appropriately for which depositions to attend.
4 If they need to redact something for whatever reason, it would
5 be individual information, which I wouldn't see how that would
6 happen on the lower liability issues. I just think it's just
7 fair if that's what, you know, the Court has earlier ruled for
8 them, and the Court had said we're allowed to do that, and not
9 without any briefing or anything of that sort not being allowed
10 to go forward with it.

11 And without seeing the expert reports, at least on
12 liability issues, I would just think out of abundance of
13 fairness, we should at least be able to make a record on that
14 issue.

15 That's all, Your Honor.

16 MR. STERN: I agree. And I didn't include every
17 expert that we've named in our motion for a protective order.
18 I've only included those experts that are testifying about the
19 health of the children and actually evaluated the children or
20 utilized the evaluations of the children to give their opinion.
21 We have four or five other experts that you are welcome to
22 their reports. We haven't hid them. No one's even asked for
23 those reports.

24 THE COURT: Okay. Here's what we're going to do: I'm
25 going to grant the motion. I think our next discovery

1 conference is October 21st.

2 And, Mr. Leopold, I'll permit you -- we'll put this
3 issue of the next round of experts that the individuals are
4 planning to have who are more in a sense --

5 Something just beeped here. I don't know what it is.

6 In a sense, more global. We'll put that issue on the
7 agenda, if you all still want it on the agenda on the 21st.
8 But you can certainly brief it. If you need more than one page
9 to discuss it, that's fine with me.

10 MR. LEOPOLD: May I also ask ...

11 THE COURT: But I want to ask that the clients not
12 appoint the five depositions related to the children's health
13 care. Does anybody have a ...

14 Nobody has a problem with that.

15 MR. LEOPOLD: Your Honor, may I just ask, at least on
16 the record, for a copy of the reports for liabilities that
17 Mr. Stern and Hunter were referring to so we can at least begin
18 to evaluate those?

19 MR. SHKOLNIK: Sure.

20 THE COURT: Okay. It's already been conveyed and
21 agreed upon.

22 MR. ROGERS: So ...

23 THE COURT: Yeah, Mr. Rogers?

24 MR. ROGERS: Yes, thank you, Your Honor.

25 MR. HUNTER: Your Honor, before we get to the next

1 point, I have a another hearing starting in --

2 THE COURT: Well, hold on, Mr. Shkolnik. Mr. Rogers
3 was talking.

4 MR. ROGERS: Yes, Your Honor. In terms of clients
5 attending the deposition on Monday, for example, of
6 Dr. Krishnan, we have counsel for VNA who is a VNA employee who
7 is going to attend. You know, that's appropriate, correct?

8 THE COURT: That's appropriate. I was talking about
9 community members. So that is the neighbor or the teacher,
10 that just doesn't seem right.

11 MR. ROGERS: Thank you.

12 THE COURT: Unless it's going to be testimony at
13 trial. But, absolutely, okay.

14 MR. ROGERS: Thank you.

15 THE COURT: So Mr. Shkolnik?

16 MR. SHKOLNIK: Your Honor, I'm sorry to interrupt. I
17 was just saying I had to leave because I have another emergency
18 court hearing on a different case at 5:30. So I apologized.

19 THE COURT: That's too many court hearings on Friday
20 at 5:00.

21 MR. SHKOLNIK: On Friday, exactly.

22 THE COURT: All right. Good luck with that one.

23 MR. SHKOLNIK: All right. Have a good weekend,
24 everyone.

25 THE COURT: So we're on the record and what I'll do is

1 enter a very simple order that says for the reasons set forth
2 on the record the motion is granted.

3 MR. STERN: Thank you.

4 THE COURT: So we'll do that.

5 And, Mr. Leopold, I assure you that we'll revisit this
6 on October 21st, if requested. You'll have the list of
7 Mr. Stern's additional, more global experts, less focused on
8 the individuals' healthcare and you can decide whether you want
9 to attend or participate in those depositions.

10 MR. LEOPOLD: Thank you, Your Honor. I appreciate
11 that.

12 THE COURT: Okay. Thank you all. Take care. I hope
13 everybody takes a short, deep breath and continues to stay
14 healthy.

15 (At 5:30 p.m., matter concluded.)

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C E R T I F I C A T E

I, Darlene K. May, Official Court Reporter for the United States District Court, Eastern District of Michigan, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

October 3, 2020
Date

/s/ Darlene K. May
Darlene K. May, CSR, RPR, CRR, RMR
Federal Official Court Reporter
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